

In The Superior Court of Pennsylvania

NO. 50 EDA 2009

MICHELLE GORMELY

Appellant

vs.

COTY EDGAR

Appellee

**AMICUS BRIEF SUBMITTED BY THE PENNSYLVANIA DEFENSE INSTITUTE
IN SUPPORT OF POSITION OF APPELLEE COTY EDGAR**

**APPEAL FROM THE ORDER OF DECEMBER 4, 2008
OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
JUNE TERM 2007 NO. 002496**

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STATEMENT OF INTEREST

The Pennsylvania Defense Institute (PDI) is a statewide association of defense counsel and insurance company professionals. Organized forty (40) years ago in December of 1969, it now boasts a combined membership of approximately 1,000 lawyers, insurance company professionals, members of self-insurers, and independent adjusters from all across the Commonwealth of Pennsylvania. The members of the PDI include representatives working at all ends of the insurance spectrum, from automobile, land, other property, to casualty insurers. Also a part of the PDI are attorneys who customarily represent those carriers and their insureds in Pennsylvania civil litigation matters. Issues, such as those presently before the Court in this matter, are routinely encountered by PDI members and the clients they serve.

The Pennsylvania Defense Institute, through its publications, teaching programs, and seminars, provides a forum for developing public policy initiatives through the exchange of ideas and discussion. The goals of the PDI include the prompt, fair and just disposition of claims, the preservation of the administration of justice, and the enhancement of the legal profession's service to the public. In addition to encouraging improvements in the administration of justice in the Commonwealth of Pennsylvania, the PDI also works towards the elimination of court congestion and delays in civil litigation. In this regard, the PDI tracks and monitors proposed and pending litigation which may affect its members or alter the course of a fair and just system of litigation in Pennsylvania. The PDI also strives to present the reasoned perspective of its members in significant cases working their way through the court system.

The Pennsylvania Defense Institute has a significant interest in this case because its members, as well as the policyholders of the insurance company members, i.e. the

Pennsylvania public, may be materially affected by the outcome of this matter which implicates the collateral order doctrine and the truth-seeking purpose of discovery proceedings in all personal injury civil litigation matters. The PDI therefore files this Amicus Curiae (Latin for “a friend of the court”) Brief because it believes that there will be broader ramifications if discovery of a plaintiff’s prior medical history for similar complaints is unfairly circumscribed as requested by the Plaintiff in this matter.

For these broader policy reasons, and for the more specific substantive reasons stated below, it is respectfully requested that this Court either find that this appeal is improper or, instead, affirm the trial court’s December 4, 2008 discovery Order as properly compelling the Plaintiff’s compliance in securing the release of the prior medical records relevant to the Plaintiff’s claims of severe emotional or mental injuries presented in this matter.

INCORPORATION

The Pennsylvania Defense Institute incorporates by reference the entire Brief submitted on behalf of the Defendant/Appellee, Coty Edgar, specifically including but not limited to, his Statement of Jurisdiction, Order in Question, and Statement of the Questions Presented. Pa. R.A.P. 2137.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Under Pennsylvania law, the trial court was granted broad discretion to address the discovery Motion to Compel filed by the Defendant, Coty Edgar, in the underlying matter. See McNeil v. Jordan, 586 Pa. 413, 426-427, 894 A.2d 1260, 1268 (2006).

“Judicial discretion requires action in conformity with law on facts and circumstances before the trial court after hearing and consideration.” Continental Casualty Co. v. Pro Machine, 916 A.2d 1111, 1115 (Pa.Super. 2007) quoting Chenot v. A.P. Green Services, Inc., 895 A.2d 55, 61 (Pa.Super. 2006)[citation omitted].

“Consequently, the court abuses its discretion if, in resolving the issues for decision, it misapplies the law, exercises its discretion in a manner lacking reason, or does not follow legal procedure.” Continental Casualty, 916 A.2d at 1115-1116; Chenot, 895 A.2d at 61.

In reviewing the trial court’s Order granting the Motion to Compel filed by Defendant, Coty Edgar, since discovery matters are decided within the broad discretion of the trial court, the Superior Court generally applies an abuse of discretion standard on appeal. McNeil, 586 Pa. at 426-427, 894 A.2d at 1268. “To the extent that the question involves a pure issue of law, [the Superior Court’s] scope and standard of review are plenary.” Crum v. Bridgestone/Firestone North American Tire, LLC, 907 A.2d 578, 585 (Pa.Super. 2006).

STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on September 29, 2006. **(R. 1a – 7a)**. The Plaintiff/Appellant, Michelle Gormley, was allegedly injured when the vehicle she was operating was involved with an accident with a vehicle owned and operated by Defendant/Appellee, Coty Edgar. **(R. 1a – 7a); Complaint, para. 5**. The Plaintiff eventually filed suit in the Philadelphia County Court of Common Pleas on June 21, 2007 seeking a recovery for personal injuries and property damages. **(Id.; Complaint at para. 7, 17)**. In addition to alleging physical injuries, the Plaintiff also alleged that she suffered disabling, anxiety and frustration, along with severe and disabling mental anguish, all on a continuing basis as a result of the accident. **(Id. at 5a -6a; Complaint at para. 12, 15)**.

During the course of discovery, the Defendant/Appellee, Coty Edgar, attempted to subpoena the Plaintiff's medical records from various locations, including the Lower Bucks Hospital, where the Plaintiff had a mental health evaluation completed prior to the subject accident. The trial court Order issued by Judge Allan L. Tereshko of the Philadelphia County Court of Common Pleas compelling the Plaintiff to cooperate with the securing and production of the records from that hospital is the subject of this appeal.

More specifically, as required by the Lower Bucks Hospital, the Defendant/Appellee, Coty Edgar, requested the Plaintiff/Appellant, Michelle Gormley, to execute a special authorization for the release of that facility's records. **(R. 23a – 30a; Discovery Hearing Transcript, December 4, 2008, p. 3)**. The Plaintiff refused to comply with the Defendant's request. As such, the defense filed a Motion to Compel. **(R. 56b – 62b)**.

In her filings and at the discovery hearing of December 4, 2008, the Plaintiff asserted an objection to the production of OB-GYN records and a mental health evaluation. The

trial court summarily determined that the OB-GYN records were not discoverable given that no gynecological injuries were claimed. That portion of the Order and those OB-GYN records are not at issue.

However, the Plaintiff has made specific claims of disabling and continuing anxiety and frustration along with severe, disabling and continuing mental anguish as a result of the subject motor vehicle accident. After conducting an *in camera* review of the sought after pre-accident mental health records as a further protective measure for the Plaintiff, the trial court held that, since the Plaintiff was pursuing a recovery under allegations of severe and indefinitely continuing emotional and mental injuries in this matter, the mental health records were discoverable by the defense. (R. 27a, 28a, 8a). As such, the trial court issued its December 4, 2008 Order granting the Defendant's Motion to Compel in this regard. (R. 28a, 8a).

Thereafter, on December 30, 2008, the Plaintiff, Michelle Gormley, filed an appeal from the December 4, 2008 discovery Order of Court. Two issues are presented by this appeal:

1. Whether a granting of the Defendant's motion to compel discovery is collateral order for purposes of appeal under the collateral order doctrine.
2. Whether the trial court correctly granted the Defendant's motion to compel the Plaintiff's compliance with the discovery of a pre-accident mental health evaluation report on the Plaintiff's prior emotional and mental health in a case where the Plaintiff alleges severe and continuing emotional distress, anxiety, and mental anguish as a sole result of the motor vehicle accident which is the subject of this litigation.

For the reasons stated below, it is respectfully requested that the Superior Court issue a decision either (1) holding that the trial court Order was not a collateral order subject to appeal under the collateral order doctrine, or, in the alternative, (2) affirming the trial court's

discovery Order compelling the Plaintiff's compliance with the efforts to secure the pre-accident mental health record.

SUMMARY OF ARGUMENT

It is respectfully submitted that this Honorable Court should find that the Plaintiff, Michelle Gormley, has failed to satisfy the elements of the collateral order doctrine, Pa.R.A.P. 313, necessary to allow the discovery order at issue to be properly appealed to this Court. Accepting the Plaintiff's improper appeal on the discovery issue presented in this matter could serve to open the floodgates in terms of appeals of tangential discovery issues that would overrun the appellate court and halt the normal progress of litigation in the trial courts. For these reasons, the Court should reject the Plaintiff's appeal as improper.

Should this Court instead agree to address the issue presented on the merits, it is respectfully submitted that the privilege asserted by the Plaintiff with respect to her pre-accident mental health records at issue was waived by virtue of the Plaintiff's pursuit of specific claims of severe mental health and emotional distress injuries in this matter. By asserting such claims of injury, all alleged to be solely as a result of the subject accident, the Plaintiff placed her mental health status at the center of the causation issue, thereby waiving any asserted privilege against disclosure of medical records on that issue.

Furthermore, it is emphasized that, before entering its Order in this matter, the trial court provided the Plaintiff with the additional level of protection in the form of an *in camera* review of the documents at issue prior to deeming the records discoverable. It is respectfully submitted that the Superior Court should not substitute its judgment for that of the trial court in this regard. Since it was well within the trial court's broad discretion to therefore allow the discovery of this evidence, the trial court did not commit any error of law or abuse of discretion in granting the Defendant's Motion to Compel the Plaintiff's compliance with the discovery efforts in this matter. As such, it is respectfully requested that the trial court's December 4, 2008 Order be affirmed.

ARGUMENT

I. THE TRIAL COURT ORDER GRANTING THE DEFENDANT'S MOTION TO COMPEL PLAINTIFF'S COMPLIANCE WITH DISCOVERY EFFORTS IS NOT A COLLATERAL ORDER UNDER THE COLLATERAL ORDER DOCTRINE.

It is initially asserted that the trial court Order granting the Defendant's Motion to Compel the Plaintiff's compliance with the discovery efforts in this matter is not a collateral order under the collateral order doctrine and, therefore, the issue presented is not properly before this Court on appeal. The argument presented by Defendant/Appellee, Coty Edgar, in his appellate filings in this regard is incorporated herein and adopted in this Brief.

Pa.R.A.P. 2137.

It is additionally and more broadly asserted that if the Court were to find side, or tangential, issues, such as those involving motion to compel discovery orders similar to the one at issue, to be collateral orders capable of being appealed, then there would be a great potential that the already overburdened (but efficient) Superior Court would be inundated by additional appeals and innumerable civil litigation matters in the trial courts could be ground to a halt by such appeals. Such would result in rampant court-congestion throughout the Commonwealth of Pennsylvania. Accordingly, for this additional reason, it is respectfully requested that the Superior Court find that the Plaintiff/Appellant, Michelle Gormley, has failed to satisfy any of the three required elements of the collateral order doctrine, thereby requiring a rejection of this appeal.

In any event, should the Superior Court instead find that the issues presented have been appropriately appealed, it is respectfully submitted that the following legal analysis compels the conclusion that the trial court properly granted the Defendant's Motion to Compel with respect to the pre-accident mental health evaluation records at issue. The Plaintiff has waived any asserted privilege against disclosure of these records by alleging

that her severe, disabling, and ongoing emotional and mental health injuries were solely caused by the motor vehicle accident which is the subject of this litigation.

II. AFTER AN *IN CAMERA* REVIEW OF PERTINENT DOCUMENTS, THE TRIAL COURT CORRECTLY GRANTED THE DEFENDANT’S MOTION TO COMPEL THE PLAINTIFF’S COMPLIANCE WITH DISCOVERY PERTAINING TO THE PLAINTIFF’S PRE-ACCIDENT EMOTIONAL AND MENTAL HEALTH CONDITION IN A CASE WHERE THE PLAINTIFF ALLEGES EMOTIONAL AND MENTAL HEALTH INJURIES SOLEY AS A RESULT OF THE SUBJECT MOTOR VEHICLE ACCIDENT.

It is initially respectfully asserted that, in reviewing this discovery issue on appeal, it is important to keep in mind that the question presented is one of the much broader issue of the *discoverability* of evidence and not the narrower, and currently inapplicable, question of the *admissibility* of the evidence at issue. Keeping this thought in mind compels the conclusion that the lower court correctly ruled that, as part of the truth-searching process of discovery, Defendant Edgar was entitled to discover the information at issue concerning an aspect of the Plaintiff’s prior mental health medical history specifically implicated by the Plaintiff’s claims of similar mental health injuries allegedly incurred solely as a result of the subject accident as pled in this personal injury litigation.

A. Well-settled bedrock principles of Pennsylvania law establish that the truth-seeking purpose of civil litigation matters can require a finding of a waiver of the privilege against disclosure of medical records in appropriate personal injury cases.

Taking a step back and looking at the big picture, it is well established under Pennsylvania jurisprudence that “the purpose of...civil trials is to discover the *truth*...” **Bailey v. Tucker**, 533 Pa. 237, 248, 621 A.2d 108, 113 (1993)[emphasis in original]. Accordingly, “the purpose and spirit of discovery proceedings is to avoid surprises at trial and to permit trials to be a truth-seeking devi[c]e.” **Feld v. Merriam**, 1980 WL 194225, 4 Phila.Co.Rptr 511 (Phila. Co. 1980), aff’d as modified, 314 Pa.Super. 414, 461 A.2d 225

(1983), rev'd on other grounds, 506 Pa. 383, 485 A.2d 742 (1984). Stated otherwise, “[t]he purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits.” Dominick v. Hanson, 753 A.2d 824, 826 (Pa.Super. 2000) quoting Smith v. Grab, 705 A.2d 894, 902 (Pa.Super. 1997) quoting Linker v. Churnetski Transp., Inc., 360 Pa.Super. 366, 368-369, 520 A.2d 502, 503 (1987), appeal denied, 516 Pa. 641, 533 A.2d 713 (Pa. 1987).

It is also a bedrock principle of Pennsylvania law that, where a plaintiff places her *physical* condition at issue in a personal injury lawsuit, any privilege associated with her medical records concerning such a physical condition is considered waived and the records discoverable. See 42 Pa.C.S. § 5929, “Physician not to disclose information” (“No physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending a patient...except in civil matters brought by such patient, for damages on account of personal injury.”); Moses v. McWilliams, 379 Pa.Super. 150, 160-161, 181, 549 A.2d 950, 955-956, 966 (1988)(Cirillo, P.J., concurring and dissenting).

In the Moses case, the Superior Court confirmed that “[p]atients waive the [patient-physician] privilege when they institute civil actions for personal injury.” 379 Pa.Super. at 160-161, 549 A.2d at 956. That court also noted that the rationale supporting the waiver rule is that “it is inconsistent for a patient to base a claim upon his medical condition and then use the privilege to prevent the opposing party from obtaining and presenting conflicting evidence pertaining to that condition.” 379 Pa.Super. at 181, 549 A.2d at p. 966 (Cirillo, P.J., concurring and dissenting) [citation omitted]. As argued herein, it logically follows that when a plaintiff bases a part of his or her personal injury claim upon a mental health condition or injury, the plaintiff should likewise not be permitted to utilize a

privilege in an effort to prevent the opposing party from obtaining conflicting evidence in discovery pertaining to that condition or injury.

On appeal in this matter, the Plaintiff/Appellant, Michelle Gormley, incorrectly argues that the lower court abused its discretion or committed an error of law by granting the Defendant Edgar's Motion to Compel and ordering the disclosure of medical records regarding a pre-accident mental health evaluation completed on the Plaintiff. To the contrary, where, as here, the Plaintiff has alleged claims of severe, disabling, and continuing emotional distress, anxiety and mental anguish all as a result of the accident which is the subject of this litigation, the trial court did not commit any error of law or abuse its broad discretionary powers by granting Defendant Edgar's Motion to Compel. Rather, the lower court properly allowed the Defendant to discover pertinent information on the Plaintiff's relevant mental health condition and treatment prior to the subject accident as part of the truth-seeking process on the crucial issue of causation.

B. Plaintiff/Appellant, Michelle Gormley, waived any asserted privilege against the production of her pre-accident medical records at issue by pursuing a claim for recovery in this matter for emotional distress and mental health injuries.

The Plaintiff alleges in her Complaint that “[a]s a further result of the negligence of the defendant., the plaintiff has been unable to attend to her usual duties and occupations, avocations and enjoyment of life, all of to her great loss, frustration, and anxiety, and she may continue to be so disabled for an indefinite time in the future.” (R. 5a; Plaintiff's Complaint at para. 12). The Plaintiff also asserts in her Complaint that “[a]s a further result of the said accident, plaintiff has suffered severe physical pain, mental anguish and humiliation and which such suffering may continue for an indefinite period of time in the future.” (R. 6a; Plaintiff's Complaint at para. 15).

By so pleading such mental and emotional injuries as a result of the subject accident, the Plaintiff thereby placed her mental status and psychological well-being at issue in the case. Accordingly, faced with such allegations, the defense desired to explore relevant evidence on the Plaintiff's mental status. Such can not be correctly described as a "fishing expedition." Rather, the defense was attempting to engage in a permissible and valid effort to determine the truth in terms of whether the Plaintiff's alleged emotional distress and mental health injuries were indeed caused or aggravated by the subject accident or were, instead, pre-existing conditions unrelated to the accident at issue.

Under the Pennsylvania Rules of Civil Procedure pertaining to discovery, i.e., Pa. R.C.P. 4003.1(a), a party is permitted to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." 42 Pa.R.C.P. 4003.1(a). Under Pa. R.C.P. 4003.1(b), information is discoverable where the information sought "appears to be reasonably calculated to lead to the discovery of admissible evidence." 42 Pa.R.C.P. 4003.1(b). Such permissible discovery may be circumscribed by the trial court under Rules 4011 and 4012, which allow the court to issue orders to protect a party from unreasonable "annoyance, embarrassment, oppression, burden, or expense..." in terms of discovery requests. See 42 Pa.R.C.P. 4011, 4012.

It is respectfully submitted that, an application of these Rules to the case at hand compels the conclusion that the lower court's December 4, 2008 Order should be affirmed. Given the Plaintiff's express claims of ongoing severe and disabling emotional and mental injuries from the subject accident as contained in her Complaint, the trial court, after completing a protective *in camera* review of the documents at issue, correctly compelled the Plaintiff's compliance. Allowing the defense to secure evidence on the Plaintiff's prior, similar mental and emotional distress issues was essential to ensure that the ongoing search

for the truth on the causation issue, by way of valid discovery efforts in this civil litigation matter, could be continued by the parties.

The reliance by the Plaintiff/Appellant, Michelle Gormley, upon a claim that the evidence at issue is privileged as confidential communications to a mental health medical provider is misplaced. It is agreed that Pennsylvania law recognizes the existence of such a client-psychiatrist/psychologist privilege under the Mental Health Procedures Act, 50 P.S. § 7111, as well as under 42 Pa.C.S.A. §5944, pertaining to “Confidential communications to psychiatrists or licensed psychologists.”¹ However, the privilege is not absolute. See Johnsonbaugh v. Dept. of Public Welfare, 665 A.2d 20 (Pa.Cmwlth. 1995)(confidential provisions of 50 Pa.C.S. §7111 may be waived by patient), aff’d, 549 Pa. 572, 701 A.2d 1357 (1997); Rost v. State Board of Psychology, 659 A.2d 626, 629 n. 10 (Pa.Cmwlth. 1995)(privilege under 42 Pa.C.S. §5944 may be waived), appeal denied, 543 Pa. 699, 670 A.2d 145 (1995).

More specifically, 42 Pa.C.S. §5944 codifies the patient-psychiatrist/psychologist privilege under Pennsylvania law but does not expressly mention “waiver.” See 42 Pa.C.S. § 5594; Rost, 659 A.2d at 629 n. 10. The language of this statutory privilege does expressly state, however, that the confidential communications between the patient and a mental health provider are to be treated in the same way as under the attorney-client privilege. Id. As confirmed by the appellate court decision in Rost, it has been repeatedly held that the attorney-client privilege can be waived by the client in certain circumstances. Rost, 659 A.2d at 629, n. 10 [citations omitted]. It therefore logically follows that the

¹ 42 Pa. C.S. §5944 reads, as follows:

No psychiatrist or person who has been licensed under the act of March 23, 1972 (P.L. 136, No. 52), to practice psychology shall be, without the written consent of his client, examined in any civil or criminal matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.

patient-psychiatrist/psychologist privilege may also be deemed to have been waived in certain circumstances. Id. (Since the attorney-client privilege may be waived, it follows, “[t]herefore, [that] the waiver principle is applicable to the psychologist-client privilege.”).

Relevant to the specific discovery dispute at hand in this matter, the courts of this Commonwealth have repeatedly held that the patient-psychiatrist/psychologist privilege can be waived by the filing of a lawsuit seeking a recovery for mental or psychological injuries.

See Rost, 659 A.2d at 629 (the patient-psychologist privilege is waived, in civil actions, “where the client places the confidential information at issue in the case”)[citation omitted]; Kraus v. Taylor, 710 A.2d 1142 (Pa.Super. 1998)(same), appeal granted, 556 Pa. 257, 727 A.2d 1109 (1999), appeal dismissed as improvidently granted, 560 Pa. 220, 743 A.2d 451 (2000); Loftus v. Consolidated Rail Corp., 12 Pa.D.&C.4th 357 (Cumb. Co. 1991)(plaintiff found to have waived privilege where emotional distress and mental anguish alleged as a result of defendant’s false accusation of theft; plaintiff’s request for a protective order against additional discovery denied); Russell v. Commercial Union Ins. Co., 9 Pa.D.&C.4th 632 (C.P. 1991)(insurer entitled to access to insured’s psychiatric records and confidentiality of records provided under 42 Pa.C.S.A. §5944 inapplicable where insured’s mental condition at issue in claim for payment for psychiatric hospital’s care); see also Strunge v. Commonwealth of Pennsylvania, 1994 WL 1251232 (Pa.Com.P. 1994) citing 42 Pa.C.S.A. §5944 (“Although the psychiatric/psychological records may have been subject to the patient-psychiatrist/licensed psychologist privilege at one time, the statutory privilege is clearly waived by the filing of a lawsuit seeking recovery for mental or psychological injuries.”); see also Premak v. J.C.J. Ogar, Inc., 148 F.R.D. 140 (E.D.Pa.

1993)(privilege against disclosure of confidential substance abuse information waived where plaintiff put information at issue in litigation); Mulholland v. Dietz, 896 F.Supp. 179 (E.D.Pa. 1994)(same result as Premak); O'Boyle v. Jensen, 150 F.R.D. 519 (M.D.Pa. 1993)(same result as Premak).

Application of the above law to the case at hand leads to the conclusion that the trial court did not err or abuse its broad discretion in finding that the Plaintiff/Appellant, Michelle Gormley, waived any asserted privilege against disclosure by her pursuit of a recovery for mental and emotional distress injuries in this matter.

C. Since the benefit of ensuring that the Commonwealth of Pennsylvania's compelling interest in seeing that the truth is ascertained in its civil litigation matters outweighs any injury that may be caused by a finding that the privilege asserted by the Plaintiff/Appellant has been waived, disclosure of records must be permitted.

The courts of Pennsylvania have further held that, in enacting the privilege/confidentiality statute of 42 Pa.C.S. §5944, “the legislature intended the psychologist/psychiatrist client privilege to yield before the state’s compelling interest in seeing that truth is ascertained in legal proceedings and fairness maintained in the adversary process.” Hepler v. Avis, 63 Pa.D.&C.4th 129 (York Co. 2003) citing Kraus v. Taylor, 710 A.2d 1142 (Pa. Super. 1998). Therefore, even the Plaintiff/Appellant’s argument that the disclosure of the records are protected by her constitutional right to privacy in her records must give way to the state’s more compelling interest in the truth-seeking processes of civil litigation matters. See Commonwealth v. Nixon, 563 Pa. 425, 434, 761 A.2d 1151, 1156 (2001)(The right to privacy under the Pennsylvania Constitution is more strictly protected than the right under the U.S. Constitution, but both are overridden by a compelling state interest.).

It is reiterated and emphasized that civil litigation matters are truth-seeking processes. In this regard, it has been generally held that where, as here, the injury that may result to the patient-psychiatrist/psychologist relationship from the disclosure of confidential information “is less than the benefit thereby gained for the correct disposal of litigation, then disclosure must be permitted.” 9 Standard Pennsylvania Practice 2d § 54:92 (2009) citing In re Interest of Bender, 366 Pa.Super. 450, 453-454, 531 A.2d 504, 506 (1987) (injury that may be caused by disclosure of confidential client-psychiatrist communications was outweighed by benefit gained from this disclosure in terms of the correct disposal of issues over a child’s receipt of proper parental care) citing 8 Wigmore Evidence § 2285 (McNaughton’s rev. ed. 1961); Matter of Adoption of Embick, 351 Pa.Super. 491, 502, 506 A.2d 455, 461 (1986)(statutory privilege protecting disclosure of confidential client-psychologist communications must yield to the necessity for disclosure when information is material and necessary for a proper determination of the issues presented in this proceeding to terminate parental rights), appeal denied, 513 Pa. 634, 520 A.2d 1385 (1987); see also Miller v. Colonial Refrig. Transp., Inc., 81 F.R.D. 741 (M.D.Pa. 1979)(compelling interest in conducting fair and impartial litigation overrode the patient’s right to privacy, particularly where the plaintiff placed in issue her alleged mental injury thereby rendering mental health records relevant in this motor vehicle accident litigation).

In this matter, the Plaintiff/Appellant, Michelle Gormley, has asserted that the records at issue are from a mental health evaluation that occurred about 18 months before the subject accident and allegedly involved a single evaluation centered on allegedly transient and isolated mental health issues for the Plaintiff. As such, taking the Plaintiff’s own position on the issue for argument’s sake, there would be no great injury to any patient-

psychiatrist/psychologist relationship claimed by this Plaintiff by virtue of the trial court's compelling the disclosure of these records which are allegedly unimportant to this litigation from the Plaintiff's point of view. Extending this argument further, the benefit of ensuring discovery of relevant information, or information that may be likely to lead to other admissible evidence, all in furtherance of the pursuit of the truth on causation issues in this civil litigation matter substantially outweighs any alleged injury that may be caused to Plaintiff, Michelle Gormley, by the production of the information. As such, the trial court correctly compelled the production of the records at issue.

D. The trial court was also correct in compelling the disclosure of the records at issue as such information may possibly serve to mitigate the Defendant/Appellee's damages in this matter.

Although not raised or addressed by the Plaintiff/Appellant, Michelle Gormley, in her materials, the *amicus curiae* Brief submitted by the Pennsylvania Association for Justice (PAAJ) referenced the York County Court of Common Pleas case of Mikulas v. Burdette, 67 Pa.D.&C.4th 379 (York Co. 2004). See PAAJ's Brief at p. 19. Any argument in this regard has been waived by the failure of the Plaintiff/Appellant to raise such issues in her appellate materials. (R. 18a – 20a; Appellant's Rule 1925(b) Statement). In any event, the Mikulas court incorrectly attempted to splice the issue presented between "normal" emotional distress claims and "independent" mental injury claims, a distinction without a difference.

More specifically, regardless of whether or not the claims of severe, disabling and ongoing emotional and mental injuries claimed by the Plaintiff/Appellant, Michelle Gormley, in this matter are "normal" derivatives of her other personal injuries or are "independent" injuries, if such injuries originated with or were caused by the prior March of 2005 event, or were instead already pre-existing conditions back then that were aggravated

by the March of 2005 incident, the March of 2005 medical records documenting those mental health conditions could serve, in any of these scenarios, to substantially mitigate the liability of the Defendant/Appellee, Coty Edgar, on the severe mental health injuries asserted in this matter. As such, the trial judge correctly ruled, after reviewing the records himself during an *in camera* study, that the information in those records was indeed discoverable when compared to the allegations asserted by the Plaintiff in this matter. The trial court judge's ruling served to further the ongoing process to determine the truth of the allegations as to the extent to which any of the emotional distress or mental health injuries were a proximate result of the motor vehicle accident that is the subject of this litigation.

E. The trial court correctly ruled that, to allow the Plaintiff/Appellant to pursue emotional distress and mental injury claims and yet preclude the Defendant/Appellee from valid discovery efforts on the same issue, would be “manifestly unfair and grossly prejudicial.”

As successfully argued by the defense in the Loftus case, supra, it “defies the principle of justice and equity if plaintiff is permitted to submit a claim for severe and continuing emotional and mental injuries and yet forbid the party against [sic] whom the claims are made from discovery of the nature and extent of those allegations.” 12 Pa.D.&C. 4th at 359 [bracket in original]. The trial court in its Opinion in this matter, citing Kraus, also held that permitting the Plaintiff to pursue a claim for severe and continuing emotional or mental injuries and harm while, at the same time, barring the Defendant from access to records of pre-accident complaints and treatment for emotional distress and harm, would be “manifestly unfair and grossly prejudicial.” See R. 16a; Trial Court Opinion at p. 8 citing Kraus, 710 A.2d at 1145 (The Commonwealth Court held that it “cannot believe that the Pennsylvania General Assembly intended to allow a plaintiff to file a lawsuit and then deny a defendant relevant evidence, at plaintiff’s ready disposal, which mitigates defendant’s liability.”).

There can therefore be no question that it would have been unjust and inequitable under the circumstances presented in this case for the trial court to have allowed the Plaintiff in this matter to pursue claims of severe, disabling, and indefinitely ongoing emotional and mental injuries from the subject incident and yet also preclude the Defendant from merely completing relevant discovery on the nature and extent of the Plaintiff's prior pertinent mental health conditions. Such a prohibition would have subverted the truth-seeking goals of discovery and civil litigation as a whole. If such discovery was never allowed in this matter, the case could potentially proceed to a jury without complete information as to whether the true cause of the Plaintiff's alleged injuries was the subject incident as opposed to some other unrelated pre-existing condition or cause. The jury's verdict in this case would thereby be rendered, at best, speculative or, at worst, totally incorrect or "untrue" on this issue.

In this regard, the trial court's granting of the Defendant's Motion to Compel was also proper in that the Defendant's liability could potentially be mitigated by the production and disclosure of the pre-accident mental health records as discoverable materials. Furthermore, as noted in its Opinion, the trial court, in exercising its broad and sound discretion, reasonably provided the Plaintiff with an extra level of protection on the issue presented by reviewing the records *in camera* before determining that the mental health records were indeed discoverable under the circumstances presented in this particular case.

Last but not least, it is reiterated and again emphasized that, as noted in the trial court Opinion below, the trial court's Order allowing the Defendant access to the Plaintiff's pre-accident medical health evaluation did not mean that such records were admissible at trial. **See R. 17a; Trial Court Opinion at p. 9.** The separate, distinct, and narrower issue of admissibility remains open for decision on another day. Rather, under the much broader

rules applicable to discovery matters, it is requested that the Superior Court find that the trial court did not abuse its broad discretion and, as such, that the trial court's December 4, 2008 Order should be AFFIRMED.

CONCLUSION


Given that the Plaintiff/Appellant, Michelle Gormley, failed to satisfy all three prongs of the collateral order doctrine, her appeal should be rejected. A rejection of appeals of this nature will assist in preventing this Court from being inundated with similar erroneous appeals in the future and will thereby work towards the prevention of congestion in the trial and appellate courts across the Commonwealth. However, should the Superior Court choose to address the merits of this appeal, it is nevertheless again respectfully asserted that the lower court's discovery Order should be affirmed.

Any alleged privilege associated with the Plaintiff's pre-accident mental health records at issue was waived by virtue of the Plaintiff's pursuit of claims of severe and ongoing mental health and emotional distress injuries in this matter. Furthermore, before ruling, the trial court provided the Plaintiff with the additional protection of an *in camera* review of the documents at issue prior to deeming that the records were discoverable when compared to the allegations asserted by the Plaintiff in this case. Since it was therefore well within the trial court's broad discretion to allow the discovery of the evidence at issue, the trial court did not commit any error of law or abuse of discretion in granting the Defendant's Motion to Compel the Plaintiff's compliance with the Defendant's discovery efforts.

For all of the foregoing reasons, it is respectfully submitted that this Honorable Court affirm the December 4, 2008 Order of the lower court and remand this matter back to the trial court for further proceedings.

Respectfully Submitted

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